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CLERK SUPREME COURT U.S.
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Supreme Court of the United States.

No. 1022.

C. J. HAMBBO & SON

versus

N. W. CASEY, RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION.

THOS. L. BAYNE,
For Plaintiffs and Appellants.

F. F. Hansell, Stationer and Printer, 30 Camp Street, New Orleans.

Supreme Court of the United States.

No. 1022.

C. J. HAMBBO & SON

versus

N. W. CASEY, RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION.

STATEMENT.

The plaintiffs were the holders of certain drafts, drawn by Messrs. Cavaroc & Son, endorsed by the New Orleans National Banking Association, on Messrs. Seignouret frères, for two hundred and fifty thousand francs 250,000
and on Messrs. F. Dumont & Co. for one hundred and ninety thousand francs 190,000

440,000

which were duly protested for non-payment, and plaintiffs paid the protest fees and charges, amounting to 6,467.10 francs $1,356.00
and the legal damages on said bills are ten per cent. upon 440,000 francs (44,000 francs). 9,312.16

making an aggregate of $10,668.16

There is no discussion as to the correctness of the figures, and there is no controversy as to the amount due for notarial protest fees and charges paid by plaintiffs, and amounting to $1,356. The controversy is as to the liability of the defendant for the damages. The general liability of drawers and endorsers for ten per cent. damages is conceded, as found by the

court (page 5); but defendants contend that they are excepted from this liability, on the ground that these bills of exchange were remitted by the New Orleans National Bank to the plaintiffs to cover other drafts drawn by said bank upon them, and therefore that plaintiffs are not such holders of these bills of exchange as entitles them to recover the damages.

The case is presented to the court upon an agreed statement of facts and the finding of facts by the court. This statement and finding show that the plaintiffs are the holders of the bills of exchange endorsed by the New Orleans National Banking Association, amounting to 440,000 francs; that these were protested at maturity for non-payment, and drawers and endorsers were duly notified that the protest, fees and charges were as stated, and were paid by plaintiffs; that the damages under the law are ten per cent. upon the principal sum specified in such bills, and amount to nine thousand three hundred and twelve dollars (page 5 of record), $9,312; that plaintiffs were bankers in London, and were correspondents of the New Orleans National Banking Association, which drew bills upon them and remitted exchange to cover drawings; that this exchange was thus remitted. These latter facts present the chief defence made by defendant. The other matters relate to the fact that when the first statement of plaintiffs' claim was made they did not make a demand for protest fees paid by them, and for damages; that Cavaroc & Sons became bankrupts, and paid a dividend of four per cent. to the receiver upon dividends paid by the bank, and that Seignouret frères had paid dividends of thirty-five per cent., which were regularly deducted by plaintiffs from the principal of their claim before a certificate of indebtedness was issued by the receiver to plaintiffs.

The defendants paid dividends to plaintiffs on these bills as endorsers, and then claimed and received dividends from the drawers upon the sums thus paid by them on said bills of exchange.

In his answer (pages 3–7) defendant avers, "that plaintiffs

can in no event be entitled to both costs and charges attending the protest of said bills and damages thereon as claimed, but is willing that plaintiffs should receive such costs and expenses attending the protest of said bills as is legally chargeable therefor."

The facts are thus placed before the court in the brief transcript presented. The question is one of law, and to this we address ourselves.

ASSIGNMENT OF ERRORS.

1. There was error in the judgment of the court in not giving to the plaintiffs damages upon the bills of exchange, as claimed in their petition.

2. The damages to be paid by drawers and endorsers upon protest of foreign bills of exchange, drawn in Louisiana, are fixed at ten per cent. upon the principal sum; and that defendants, as endorsers upon said bills of exchange, are liable to pay the same, and it was error to relieve them from such liability.

3. That the findings of facts by the court show that the plaintiffs were and are entitled to recover damages upon the protested bills of exchange, and it was error to deny to them judgment against the defendant for the same.

ARGUMENT.

The general liability of drawers and endorsers for damages upon protested bills is conceded, and the burden is upon defendant to show that he is exempt from this liability. He claims this exemption, not on the ground that he does not owe to the plaintiffs the amount of the bills of exchange, but he says that this indebtedness accrued to them while they stood in the relation of correspondents, receiving bills of exchange to cover drafts drawn upon them, and therefore is not liable for damages The damages are due as fully as the bills of exchange. "They constitute as much a part of the contract as the interest. But while they are now universally fixed in

amount by statute, the whole theory from which they are derived springs from the right of the holder to indemnity for dishoner of the bill which was formerly worked out through the doctrine of re-exchange." Daniel on Negotiable Instruments, vol. 2, page 389, section 1439.

These damages are not in the nature of a penalty, but in here in the contract as part of it, and the plaintiffs have just as much right to recover them as to recover any other part of the bill or the fees for protest, etc. Bank of the United States vs. The United States, 2 Howard 736; Gillespie vs. Cammack, 3 A. 250; Parsons on Bills and Notes, vol. 1, page 660; Daniel on Negotiable Instruments, vol. 2, page 405.

In this case the court says: "It has been intimated that these damages must be considered as a penalty and not as a part of the bill." This is a mistaken view of the subject. Plaintiffs, as holders of these bills, collected dividends of thirty-five per cent. from Seignouret fréres, who were acceptors of part of them. They deducted the amount of these dividends, and were recognized by defendant as creditors for the balance due on the bills (except for protest, fees and damages). These protest fees are now claimed, and the record shows that as to these there is no dispute (page 5). We might therefore ask, as Mr. Sergeant did in the admirable argument made by him in the case cited from 2 Howard's Reports: "But, further, the United States have admitted their liability for principal, interest, protest and expenses, according to the bill of exchange. If not a bill of exchange, why pay for protest? Why a protest or expenses, if not a bill of exchange? They only refuse to pay the damages, which are entirely arbitrary." It was further contended in that case that there could be no recovery by the bank because of its relations to the government, and because the bill was paid supra protest by Hottinguer & Co., for the bank; but these objections were all overruled, and it was fully recognized that the claim for damages was as complete as the claim for the principal and interest.

It was contended in the court below that the amount paid by Seignouret fréres on the bills—viz.: $16 711—after protest, should reduce the damages to ten per cent. upon the balance due on said bills—that is, to the sum of seven thousand six hundred and sixty dollars and ten cents ($7,660.10). But the answer to this is that the damages accrued at once when the bills were protested, and constituted a part of the debt due to plaintiffs at that time. The court finds that no part of the damages have been paid (record, (p. 5, art. 5), and this is conceded to be true.

The plaintiffs are creditors for and on these bills. They are described as such in the petition; and the statement annexed, which is admitted to be correct (p 182), shows that the bills are for 250,000 francs on Seignouret, and 190,000 francs on F. Dumont & Co.

Would there have been any doubt of the right of plaintiffs to recover from Cavaroc & Son, the drawers of these drafts, principal, interest, costs of protest and *damages?* Certainly not. If the acceptors had paid the bills of exchange, either before or after maturity, and plaintiffs had surrendered these without collecting damages, would the defendant have had any claim upon Messrs. Hambro & Son for the amount of these damages? We think not.

The defendants in the court below relied upon an old case in the Supreme Court of Pennsylvania, 4 Dallas Rep. 155, which seems to have been a trial before a jury, in which it is said in a note (p. 157): "The judges differing in opinion each addressed the jury, but the chief-justice, on account of indisposition, added only a few words in affirmance of the sentiments of Shippen, justice." If the sentiments thus expressed sustained the views presented, they would scarcely be considered as authority.

The case of Watts vs. Willing, 2 Dallas 100, cited, was where a debtor upon a bond afterwards drew bills of exchange, which, when paid, were to be credited upon the bond. The

court held that by the retention of the bills and the claim for damages he made them his own and therefore the amount of the bills was credited upon the bond. In the present case the plaintiffs have always held the bills, and dealt with them as owners—collecting dividends from the acceptors, and, with the assent of defendants, credited these dividends upon the bills, and holding defendants only for the balance. And the defendants show by their answer (p. 3, art. 5) that. as endorsers, they have paid dividends upon said bills to the plaintiffs, and in the same character of endorsers have claimed and received dividends upon the sums thus paid from the bankrupt estate of the drawers, C. Cavaroc & Son.

Even as late as the case in 2 Howard Rep. 736 damages were discussed as a penalty, and many of the preceding cases dealt with it as such, rather than as compensation for re-exchange. "These statutory damages are not given as a penalty for drawing without authority, but as commutation for interest, damages and re-exchange." Daniel on Negotiable Instruments, vol. 2, p. 389.

The plaintiffs are now driven to recover their money in New Orleans, where the bills were drawn. They are thus subjected to a loss, from which they are to be protected by the damages fixed by the law in cases of re-exchange. Even before damages were fixed by the statute they were recoverable to indemnify the holder for re-exchange.

So far as the other questions originally suggested in argnment, that plaintiffs have waived their claim for damages by not demanding them when they first presented their claim, there is no evidence of any waiver "*nemo presumtus donare.*"

It is shown that the dividends received from other parties to the bills of exchange have been credited already upon the principal debt before making the claim upon the defendant. The damages, however, have not been paid, as it is conceded (p. 4) and found to be a fact by the court (p. 6, art. 5). We respectfully submit that these damages are due, and that the notarial

fees and costs of protest so paid by plaintiffs are to be reimbursed to them. In the court *a qua* these were allowed by the judgment, of which defendants do not complain We ask that the decree should be amended by adding the damages, and to this extent that the judgment should be reversed.

THOS. L. BAYNE,
For Plaintiffs and Appellants.

110-216

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

No. 1022.

C. J. HAMBRO & SON, PLAINTIFFS IN ERROR,

versus

N. W. CASEY, RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

J. D. ROUSE,
WM. GRANT,
Attorneys for Defendant in Error.

December 27th, 1883.

E. P. Dansell, Stationer and Printer, 30 Camp Street, New Orleans.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

No. 1022.

C. J. HAMBRO & SON, PLAINTIFFS IN ERROR,

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N. W. CASEY, RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT.

By agreement of the parties, this case was tried by the court below without the intervention of a jury, and the court found the facts specially. The findings appear in the record, pages 5 and 6. The only question here presented is, do the findings support the judgment?

ARGUMENT.

I.

It appears from the findings that the plaintiffs, who are bankers in London, were the correspondents of the New Orleans National Banking Asso-

ciation, with whom said bank kept a running account, drawing bills of exchange upon them and remitting other bills to cover such drafts.

While this relation existed the bank acquired certain bills drawn by Cavaroc & Son, of New Orleans, upon parties in France, and remitted the same to the plaintiffs *for collection and credit.*

Soon afterwards both the bank and the drawers of the bill failed, and the bills were protested for non-acceptance and non-payment.

The plaintiffs in this action sought to recover the costs of such protest, and ten per centum upon the amount of said bill as damages, under the statutes of Louisiana.

The relation existing between the New Orleans bank and the plaintiffs was clearly that of principal and agent. The bills upon which damages are claimed were remitted by the bank to the plaintiffs *for collection.*

The question is, whether the damages which follow protest of foreign bills, in the hands of holders thereof for value, accrue to an agent to whom they are sent for collection?

By the law merchant, upon the protest of a foreign bill of exchange, the holder was entitled to a full reimbursement of all the damages sustained by him, by reason of the dishonor, from all other parties to the bill, according to their respective liabilities. Story on Bills, section 397. The damages were as-

certained by the rate of reëxchange between the country where the bill was drawn and the country where it was payable. *Ibid.*, section 399. By reëxchange is meant the right to redraw, at the place where the bill is payable, upon the place where the bill was drawn, for such a sum as will pay the amount of the face of the bill, with costs and expenses, at the place where payable. *Ibid.*, section 400. The principle of reëxchange is indemnity to the holder of the bill for the loss arising from the breach of contract. 3 Kent's Com. 115. In lieu of reëxchange and expenses as a measure of damages, a fixed sum is substituted by statute in many of the States, and in Louisiana the amount is fixed at ten per centum upon the principal sum.

But the substitution of statutory damages for those awarded by the law merchant does not change the rule that they are due only as an indemnity for loss arising from breach of contract.

This rule excludes a right to their recovery by any one who has not parted with value for the bill.

The rule is an ancient one, and does not seem to have been questioned in our day.

"The person to whom a bill is remitted in payment of an antecedent debt" cannot recover damages. "The remitter of the bill is the person entitled to the damages, he having encountered all the hazard and inconvenience of the remittance." Bayley on Bills, second Am. from fifth London ed., p.

384. *Kenworthy vs. Hopkins*, 1 Johns; Cas. 107; *Thompson vs. Robertson et al.*, 4 Johns 27; *Brown vs Jackson*, 1 Wash. C. C. R. 512.

In Keppele et al. vs. Carr et al. 4 Dallas 155, it was held "to be settled law, that when a bill of exchange is not paid and received, in satisfaction of a debt due from a merchant to his correspondent, it goes at the risk of the debtor; and the creditor who remits it for acceptance and payment stands on the footing of an *agent only* until the bill is actually paid." And it was held "that he is entitled to the damages on whose account and risk the bill was remitted."

Where a bill was drawn as additional security for a bottomry bond, previously given by the drawer, the captain of a vessel of which the drawee was owner, it was held that the drawer was not liable to damages on the dishonor of the bill. Hazelhurst vs. Keane, 4 Yeates 19.

In this case the bills were not remitted in payment of a preëxisting debt even; but for collection, the proceeds to be credited when collected. It matters not what was the destination of the money arising from the collection; but the fact that it *was* to be credited to the remitter makes it more manifest that, until the bills were collected and the proceeds so credited, the plaintiffs were simply agents for that purpose. The bills were not at their risk,

and they were not entitled to redraw upon their dishonor.

II.

It appears from the findings that the plaintiffs rendered their accounts current, from time to time, to the receiver of the New Orleans bank, claiming credits which were allowed, but made no claim for damages upon these bills. The bank failed in 1875, and it was not until 1880 that they conceived the idea of making such claim. Meanwhile the drawers of the bills had become bankrupt. The bank, as endorsers, proved these bills as a debt against the estate of the drawees. No damages could be claimed, because the bank had paid none, nor had it become liable for any. 3 Kent's Com. 116; Kingston vs. Wilson, 4 Wash. C. C. R. 310. With knowledge of the insolvency of the drawers and the bank, the plaintiffs kept silent until after the former were discharged and their estate distributed. If the bank were now compelled to pay the damages claimed, it could not receive any reimbursement from the drawers' estate. The plaintiffs, if they ever had any claim, have, by their laches, created an equitable estoppel.

III.

There is another reason why plaintiffs cannot now be allowed to recover. The fourth finding shows that there has been an *account stated* between the parties. The plaintiffs' right to the damages claimed accrued, if it accrued at all, long before the stating